No. 03-1457

Supreme Court, U.S.
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In The

Supreme Court of the United States

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

CRESCENT WHARF & WAREHOUSE CO., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF FOR THE FEDERAL RESPONDENT

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REPLY TO BRIEF FOR THE FEDERAL RESPONDENT

Although he acknowledges that the ruling below is wholly inconsistent with the statutory definition of "disability" endorsed by this Court in *Metropolitan Stevedore Company v. Rambo,* 521 U.S. 121 (1997) and the views of the agency charged with the administration of the Act,[1] the Solicitor General argues that review is not warranted "absent some reason to believe that this issue is likely to recur frequently." (Brief, page 11).

There is *every* reason to believe – indeed there is no doubt – that the issue improperly resolved by the Ninth Circuit will "recur frequently." First, the United States Department of Labor itself reports that 34 percent of all reported injuries involving lost time from work are caused by repetitive or cumulative trauma.[2] Second, this category

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[1] Specifically, the Solicitor General joins with Petitioner in asserting that "liability should fall in all cases on the last employer . . . before the compensable disability for which compensation is sought is shown to have existed," agrees that the Ninth Circuit erred by holding "that 'disability' is a function of physical rather than economic harm for the purpose of assigning liability among maritime employers," and acknowledges that the Ninth Circuit's redefinition of "disability" is (i) wholly inconsistent with the statutory language and this Court's decision in *Metropolitan Stevedore Company v. Rambo,* 521 U.S. 121 (1997), (ii) "difficult to reconcile" with the approaches taken in other circuits, and (iii) in "obvious tension" with its internal precedent. (Brief, pages 7-8, 9 at fn. 4, 10, 11).

[2] See, United States Department of Labor, Bureau of Labor Statistics, "Lost-Worktime Injuries and Illnesses: Characteristics and Resulting Days Away from Work, 2002," March 25, 2004. Although no Department of Labor agency maintains statistics documenting the percentage of current cases to which the Ninth Circuit's new rule is applicable, an informal survey of employers, insurers, claims administrators, and attorneys supports the Department's figures and indicates

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of injuries is fast expanding, increasing twenty-fold between 1972 and 2002.[3] Third, the Ninth Circuit's erroneous "cumulative trauma" rule will govern both the identification of the liable employer *and* the responsible insurance entity.

Within the maritime trades, it is extremely uncommon for a worker to spend his or her career with a single employer. It is equally rare for any individual employer to remain consistently self-insured or insured by the same carrier for extended periods. Coupled with the increasing number of cumulative trauma claims, these facts *guarantee* that the issue presented by this Petition will arise with increasing frequency.

Until the Ninth Circuit's error is corrected, those disputes will continue to be resolved by a rule that the Solicitor General and the agency charged with administrative responsibilities agree is inconsistent with the statutory language and this Court's decision in *Metropolitan Stevedore, supra,* "difficult to reconcile" with the approaches taken in other circuits, and in "obvious tension" with the Ninth Circuit's own precedent.

The Ninth Circuit's refusal to adhere to the statutory definition of "disability" is already generating results that cannot be reconciled with the Act's purposes. Examples of

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that 30% to 35% of all currently pending West Coast claims involve responsibility disputes subject to the Ninth Circuit's new rule.

[3] *Ibid.* See, also, "Musculoskeletal Disorders (MSDs) and Workplace Factors: A Critical Review of Epidemiologic Evidence for Work-Related Musculoskeletal Disorders of the Neck, Upper Extremity, and Low Back," U.S. Department of Health and Human Services, Public Health Service Centers for Disease Control and Prevention, Institute for Occupational Safety and Health, Cincinnati, OH, July 1997.

what is being spawned by the decision below within the Ninth Circuit include decisions by Administrative Law Judges in *Zuvich v. Maersk Pacific, Ltd., et al.*, 2003-LHC-00454-48, November 25, 2003, *Colaruotolo v. Centennial Stevedoring, et al.*, 2002-LHC-0287-92, 2002-LHC-1393-95, December 13, 2002, and *Cranston v. Marine Terminals, et al.*, 2003-LHC-0214, July 29, 2004.[4]

In *Zuvich,* liability was determined by the worker's retaliatory selection of the site for his final microscopic injury. In *Colaruotolo*, resolution under the Ninth Circuit's purported "bright line" standard required reports and testimony from *nine* orthopedists and neurologists attempting to confirm or deny the presence of microscopic harm. In *Cranston,* identification of the employer responsible for the costs of necessary surgery has been indefinitely delayed because continued work activities prevent identification of the Ninth Circuit's "last employer."

In *each* of these cases, application of the standard for determining liability advanced by both the Department of Labor and Petitioner – application of the standard rooted in *Cardillo* and the statutory definition of "disability" – would have permitted prompt delivery of benefits to the injured worker, lessened the costs of litigation, *and* resulted in a different outcome.

The Solicitor General is simply wrong. There is *every* "reason to believe that this issue is likely to recur frequently" and, unless review is granted and the Ninth

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[4] The decisions appear at www.oalj.gov/decisions/ALJ/LHC/2003/ZUVICH, 2002/COLARUOTOLO, and 2003/CRANSTON.

Circuit's error is corrected, every recurrence will result in a determination that cannot be squared with the legislative language or this Court's past decisions.

CONCLUSION

The Ninth Circuit clearly erred when it redefined "disability" and fashioned its unique rule for determining liability in cases involving cumulative trauma. Until that error is corrected, workers, employers, and insurance carriers within the Ninth Circuit with increasing frequency will continue to experience the types of problems typified by *Zuvich, Colaruotolo,* and *Cranston.*

Unnecessary and costly litigation will continue. Liability will be imposed even when there is no rational connection between work and the benefits awarded. For as long as continued employment and its inevitable further harm are permitted to provide immunity from liability, employers and insurers will have strong incentive to deny claims and delay the delivery of benefits.

The Solicitor's suggestion that "it is conceivable that [the ruling below] may not survive reconsideration" in a subsequent similar case stretches credulity. Within the Ninth Circuit, a decision of a panel becomes the "law of the circuit" and is binding on other panels until it is overruled by a subsequent *en banc* opinion or a superseding contrary decision of the Supreme Court. See, *Brand X Internet Servs. v. FCC,* 345 F.3d 1120, 1130 (9th Cir.

2004). The Ninth Circuit has already refused *en banc* review.

This Petition for a writ of certiorari should be granted.

Respectfully submitted,

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